STATE OF MICHIGAN

COURT OF APPEALS

TERRA KIAH HAPPY, Plaintiff-Appellee,	UNPUBLISHED April 17, 2012
v	No. 305788 Oakland Circuit Court Family Division
BENJAMIN JOSEPH GREEN, Defendant-Appellant.	LC No. 2006-718293-DP

Before: BORRELLO, P.J., and JANSEN and GLEICHER, JJ.

PER CURIAM.

Defendant Benjamin Joseph Green appeals as of right a circuit court order granting plaintiff Terra Kiah Happy's motion to change the domicile of their minor child from Michigan to Virginia. We affirm.

The parties never married. Their son, whom we refer to as EJG, was born in 2005. In 2006, Happy filed a paternity action. The parties resolved the paternity action by entering a consent judgment calling for joint legal custody of the child, with Happy maintaining sole physical custody. The judgment further provided that Green would have "reasonable parenting time until further order of the Court." [1]

For the first three and a half years of EJG's life, Happy and Green arranged their parenting time without judicial assistance. In February 2009, Green filed a motion seeking a change in custody and supervision of Happy's parenting time, alleging that EJG had sustained several injuries while in Happy's care. Child Protective Services performed an investigation and found no cause to intervene. In March 2009, the circuit court entered an order providing that the parties would continue to share joint legal custody with Happy maintaining sole physical custody. The order set forth a specific parenting time schedule for Green consisting of alternating weekends, alternate Wednesday overnights, and alternate Monday afternoons. Green

[1] On appeal, Happy claims that the parties never lived together. According to the 2006 consent judgment, however, the parties did live together in Happy's parent's home at least for a brief period.

was also granted two nonconsecutive weeks of parenting time in the summer, one overnight for Christmas, and daytime holiday parenting time. In June 2010, the circuit court modified the parenting time order by expanding Green's alternate Monday visits by three hours.

The parties agree that Green consistently exercised all of his allotted parenting time, and often enjoyed additional time with his son. Green served as an assistant coach for EJG's wrestling team, allowing him contact with EJG on two additional days each week. Green also attended all of EJG's soccer practices and games, many school activities, and parent-teacher conferences.

In March 2011, Happy filed a motion seeking to change EJG's domicile to Virginia. The motion averred that Happy had married a physician, Om Samantray, who was employed as a medical resident in Roanoke. Green opposed the move, and in June 2011, the circuit court conducted an evidentiary hearing.

At the hearing, Samantray testified that as a medical resident, he earned slightly less than $50,000 per year. He planned to enter a cardiology fellowship following his residency and hoped to remain in Roanoke. Samantray claimed that his yearly salary as a cardiologist would exceed $250,000. Happy admitted that she had not found work in Roanoke in her field as a patient care technician, but expected to do so. She speculated that she would earn approximately the same $25,000 salary as she received in Michigan.

Happy testified that she and EJG lived with her parents and siblings in a Madison Heights home. In Virginia, she explained, they would reside with Samantray in a three bedroom apartment situated in a complex offering a swimming pool, library, playground, basketball and tennis courts. She presented evidence that the quality of the Roanoke elementary school EJG would attend equaled or exceeded that of his school in Madison Heights. According to Happy, EJG looked to her for comfort, guidance, discipline, and the necessities of life. She expressed that the child's best interests would be served by the move because EJG would be part of a family unit in an area with excellent schools and other amenities. Happy proposed that if the court approved the move, Green would have parenting time during the entire summer vacation, alternating holidays, throughout the spring break, and "the option to come down any weekend he wants to[.]" She offered to assist in paying for Green's travel expenses up to four times per year, and agreed to purchase "two high-quality web-cams" so that Green and EJG could see each other every day.

Green testified that he lived with his mother and grandmother in a home he owned in Clinton Township. He attended Oakland Community College part-time and earned approximately $35,000 per year unloading trucks at a warehouse. Although the court-ordered parenting time afforded Green approximately 110 overnights with EJG, he asserted that he actually exercised more than that. Green expressed concern that if the court approved the move, he and EJG would lose their close father-son bond, and that "[b]eing away from him for such a long period and not being able to see him would . . . make me feel like a stranger to him, not being able to physically play like me and my son do, physically go outside and play sports or go to the park or do our walks, go to the library." Green disagreed that the move to Virginia would serve EJG's best interests, asserting that it would disrupt their relationship and deprive the child of the company of his close relatives in Michigan.

In a written opinion and order entered on August 10, 2011, the circuit court granted Happy's motion to change EJG's residence after reviewing the *D'Onofrio*[2] factors, which are codified at MCL 722.31(4). The court determined that because EJG had an established custodial environment only with Happy, it did not need to inquire into the best interest factors set forth in MCL 722.23. Green immediately filed a motion in the circuit court seeking to stay the order pending appeal, which the circuit court denied. This Court also denied a stay. *Happy v Green*, unpublished order of the Court of Appeals, entered September 2, 2011 (Docket No. 305788).

Green first challenges on appeal the circuit court's findings relating to MCL 722.31(4)(a), which addresses "[w]hether the legal residence change has the capacity to improve the quality of life for both the child and the relocating parent." After reviewing the evidence presented at the evidentiary hearing, the circuit court concluded that Happy "has demonstrated that her quality of life will be improved and [EJG's] quality of life will be improved by the change of domicile." Green challenges this finding, contending that by moving to Roanoke, Happy left behind in Michigan "an established job with no secure job waiting for her in Roanoke," "two strong family support networks," and "very low housing expenses." Although advantageous for Happy, Green contends the move did not have the capacity to improve EJG's quality of life.

We review for an abuse of discretion a circuit court's ultimate decision regarding a petition to change a minor child's domicile. *Brown v Loveman*, 260 Mich App 576, 600; 680 NW2d 432 (2004). This Court reviews the circuit court's factual findings "under the great weight of the evidence standard." *Rittershaus v Rittershaus*, 273 Mich App 462, 464; 730 NW2d 262 (2007) (internal quotation omitted). This standard of review requires us to affirm the circuit court's factual findings "unless the evidence clearly preponderates in the opposite direction." *Mogle v Scriver*, 241 Mich App 192, 196; 614 NW2d 696 (2000). A court considering a change of domicile must keep "the child as the primary focus in the court's deliberations." MCL 722.31(4).

An evidentiary preponderance supported the circuit court's finding that the move to Roanoke had the capacity to improve the quality of life for both EJG and his mother. The capacity of the move to benefit Happy is undisputed. Happy's marriage to Samantray enabled her to move out of her parents' home and to establish her own household. Samantray's $50,000 salary doubled the household income available to Happy and EJG even if Happy elected to stay at home rather than pursue employment. Although EJG no longer enjoys frequent visits with his Michigan relatives, "the role of the extended family cannot be the determining factor in denying a change of domicile." *Phillips v Jordan*, 241 Mich App 17, 31; 614 NW2d 183 (2000). Thus, the circuit court's determination that the move was potentially advantageous to both Happy and EJG did not contravene the great weight of the evidence.

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[2] *D'Onofrio v D'Onofrio*, 144 NJ Super 200, 206-207; 365 A2d 27, aff'd 144 NJ Super 352; 365 A2d 716 (1976), adopted by the courts of this state in *Dick v Dick*, 147 Mich App 513, 517; 383 NW2d 240 (1985). New Jersey courts subsequently modified the test for whether to grant a change in domicile. See *Holder v Polanski*, 111 NJ 344, 349-354; 544 A2d 852 (1988).

Green next contends that the great weight of the evidence contradicted the circuit court's findings concerning the *D'Onofrio* factor embodied in MCL 722.31(4)(c):

> The degree to which the court is satisfied that, if the court permits the legal residence change, it is possible to order a modification of the parenting time schedule and other arrangements governing the child's schedule in a manner that can provide an adequate basis for preserving and fostering the parental relationship between the child and each parent; and whether each parent is likely to comply with the modification.

The circuit court found that under the parenting time schedule in place before the move, Green enjoyed approximately 118 overnights, compared with Happy's 247 overnights. The schedule Happy proposed permitted Green to have EJG throughout the summer, during half the Christmas break, alternating long weekend holidays (Memorial Day, Labor Day and Thanksgiving) and the entire spring break. Happy offered to pay a portion of Green's expenses for weekend parenting time in Roanoke, and to buy web-cams for maintaining daily contact. Under Happy's proposed visitation schedule, Green would have approximately 93 overnight visits annually with EJG with the potential for an additional 12 nights. The circuit court found that the proposed parenting time schedule and other arrangements provided an adequate basis for preserving and fostering EJG's relationship with his father.

Green challenges this conclusion, pointing out that at least one month and sometimes two months will elapse between visits with his son, necessarily diminishing the quality of their relationship. A web cam, Green argues, is not an adequate substitute for physical contact. While we sympathize with Green's situation, his argument logically implies that no domicile change involving a substantial distance should ever be approved. A move across state borders necessarily must occasion a new parenting plan, which likely will not equate exactly with the previous plan. *McKimmy v Melling*, 291 Mich App 577, 583; 805 NW2d 615 (2011). However, a new parenting plan "only need provide a realistic opportunity to preserve and foster the parental relationship previously enjoyed" by the nonrelocating parent. *Mogle*, 241 Mich App at 204. Extended periods of visitation, such as that offered by a summer-long stay, may foster rather than hinder a parent-child relationship. *Anderson v Anderson*, 170 Mich App 305, 311; 427 NW2d 627 (1988). During periods of physical separation, use of a web-cam may help to preserve the parent-child bond. *McKimmy*, 291 Mich at 583.

We readily acknowledge that visiting by web-cam offers an entirely different experience than physical contact with a child. Indisputably, Happy's move to Roanoke creates new burdens for both parents in nurturing Green's relationship with his son. But the question presented by factor (c) is whether a domicile change affords the parent left behind a realistic *opportunity* to maintain and nurture the parental relationship. The substantial expansion of Green's continuous time with the child during the summer and spring breaks offer Green a genuine opportunity to sustain and strengthen his parental ties to EJG. We cannot characterize the circuit court's finding in this regard as against the great weight of the evidence. And because the circuit court's decision to approve a domicile change rested on properly supported findings of fact, we find no abuse of discretion in the court's grant of Happy's motion.

Green next contends that the circuit court erred in finding that EJG's established custodial environment existed only with Happy. A custodial environment is established if "over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort." MCL 722.27(1)(c). If a proposed relocation "would result in a change in parenting time so great as to necessarily change the established custodial environment," the court must conduct an inquiry into the best interest factors set forth in MCL 722.23. *Brown*, 260 Mich App at 594–595, 598 n 7. In ascertaining whether a proposed change modifies an established custodial environment, "it is the child's standpoint, rather than that of the parents, that is controlling." *Pierron v Pierron*, 486 Mich 81, 92; 782 NW2d 480 (2010). Whether an established custodial environment exists is a question of fact to which the great weight of the evidence standard applies. *Foskett v Foskett*, 247 Mich App 1, 8; 634 NW2d 363 (2001).

The circuit court determined that the move to Roanoke would occasion no change in EJG's established custodial environment, reasoning as follows:

> The minor child has resided with Plaintiff since birth. The parties never lived together. The minor child has never lived with Defendant. Considering the minor child's age, the physical environment, and the inclination of the custodian and the minor child regarding permanency of the relationship, the court finds that the move to Virginia will not substantially affect the established custodial environment of the minor child, and therefore the court need not conduct an inquiry into the best interest factors set forth in MCL 722.23.

Green insists that an established custodial environment existed with both parents. He emphasizes that he and the child spent a portion of at least 8 days in every 14-day cycle together and were "psychologically bonded."

From birth, EJG resided continuously with Happy. The evidence established that during Green's parenting time, his mother often played a major role in caring for the child. Particularly given the child's young age, the evidence supported Happy's testimony that EJG primarily looked to her for guidance, discipline, the necessities of life, and parental comfort. Thus, the trial court's determination that the established custodial environment existed only with plaintiff was not against the great weight of the evidence.

Lastly, defendant argues that the trial court erred in failing to assess the best interest factors of MCL 722.23. Because the proposed relocation did not change the child's established custodial environment, the circuit court was not obligated to consider the best-interest factors. *Rittershaus*, 273 Mich App at 470-471; *Brown*, 260 Mich App at 598 n 7.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Elizabeth L. Gleicher